

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
EUREKA DIVISION

DAVID SCOTT HARRISON,  
Plaintiff,

v.

KAREN HILLIARD, et. al.,  
Defendants.

No. C 15-1396 NJV (PR)

**ORDER OF DISMISSAL WITH  
LEAVE TO AMEND**

Dkt. No. 8

Plaintiff, a state prisoner, has filed a pro se civil rights complaint under 42 U.S.C. § 1983. He has been granted leave to proceed in forma pauperis. The court dismissed the original complaint with leave to amend and plaintiff has filed an amended complaint. (Doc. 10.)

**DISCUSSION**

**A. Standard of Review**

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the statement need only "give the defendant fair notice of what the . . . claim is and the

grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citations omitted). Although in order to state a claim a complaint "does not need detailed factual allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). A complaint must proffer "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. The United States Supreme Court has recently explained the "plausible on its face" standard of *Twombly*: "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged deprivation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

#### **B. Legal Claims**

Plaintiff argues that a book sent to him in the mail was lost or stolen and prison officials are censoring his mail and delivering it late.

Neither the negligent nor intentional deprivation of property states a due process claim under § 1983 if the deprivation was random and unauthorized. *See Parratt v. Taylor*, 451 U.S. 527, 535-44 (1981) (state employee negligently lost prisoner's hobby kit), *overruled in part on other grounds, Daniels v. Williams*, 474 U.S. 327, 330-31 (1986); *Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (intentional destruction of inmate's property). The availability of an adequate state post-deprivation remedy, e.g., a state tort action, precludes relief because it provides sufficient procedural due process. *See Zinermon v.*

1 *Burch*, 494 U.S. 113, 128 (1990) (where state cannot foresee, and therefore provide  
2 meaningful hearing prior to, deprivation statutory provision for post-deprivation hearing or  
3 common law tort remedy for erroneous deprivation satisfies due process); *King v.*  
4 *Massarweh*, 782 F.2d 825, 826 (9th Cir. 1986) (same). California law provides such an  
5 adequate post-deprivation remedy. See *Barnett v. Centoni*, 31 F.3d 813, 816-17 (9th Cir.  
6 1994) (citing Cal. Gov't Code §§ 810-895).

7 Prisoners enjoy a First Amendment right to send and receive mail. See *Witherow v.*  
8 *Paff*, 52 F.3d 264, 265 (9th Cir. 1995) (citing *Thornburgh v. Abbott*, 490 U.S. 401, 407  
9 (1989)). A prison, however, may adopt regulations or practices which impinge on a  
10 prisoner's First Amendment rights as long as the regulations are "reasonably related to  
11 legitimate penological interests." See *Turner v. Safley*, 482 U.S. 78, 89 (1987). The *Turner*  
12 standard applies to regulations and practices concerning all correspondence between  
13 prisoners and to regulations concerning incoming mail received by prisoners from  
14 non-prisoners. See *Thornburgh*, 490 U.S. at 413. The inspection for contraband of  
15 non-legal mail does not violate a prisoner's constitutional rights. See *Witherow*, 52 F.3d at  
16 265-66 (upholding inspection of outgoing mail).

17 Prison officials have a responsibility to forward mail to inmates promptly. See *Bryan*  
18 *v. Werner*, 516 F.2d 233, 238 (3d Cir. 1975). Allegations that mail delivery was delayed for  
19 an inordinate amount of time are sufficient to state a claim for violation of the First  
20 Amendment. See *Antonelli v. Sheahan*, 81 F.3d 1422, 1432 (7th Cir. 1996). Any practice  
21 or regulation that unduly delays an inmate's incoming mail must be reasonably related to  
22 legitimate penological interests. See *Turner v. Safley*, 482 U.S. at 89. But a temporary  
23 delay or isolated incident of delay does not violate a prisoner's First Amendment rights.  
24 See *Crofton v. Roe*, 170 F.3d 957, 961 (9th Cir. 1999) (policy of diverting publications  
25 through property room reasonably related to prison's interest in inspecting mail for  
26 contraband).

27 Plaintiff first argues that he did not receive a book he ordered, "Lockdown America".  
28

1 Defendants initially informed plaintiff that he could not have this book and it would have to  
2 be returned or destroyed and he had 15 days to decide. Plaintiff appealed and staff ruled  
3 they had made an error and plaintiff could have the book, but it had already been returned.  
4 Plaintiff argues that defendants did not wait the 15 days and the book was returned or  
5 destroyed before that time period ended. He argues that defendants improperly stole or  
6 destroyed it. However, plaintiff is not entitled to relief for his claim that the property was  
7 negligently or intentionally destroyed or stolen. See *Parratt*. This claim is dismissed with  
8 leave to amend.

9 Plaintiff also argues that defendants censored his mail, but he provides no specific  
10 details regarding the alleged censorship. This claim is also dismissed with leave to amend.  
11 Plaintiff next argues that his mail has been delivered late and he attaches a chart that sets  
12 for the postmark when the materials were mailed and when he received it, which was  
13 usually twenty-five days later. Though, it is not clear when mail actually arrived at the  
14 prison. Liberally construed, this is sufficient to state a claim for relief.

### 15 CONCLUSION

16 1. The amended complaint is **DISMISSED** with leave to amend in accordance with  
17 the standards set forth above. The amended complaint must be filed within **twenty-eight**  
18 **(28) days** of the date this order is filed and must include the caption and civil case number  
19 used in this order and the words SECOND AMENDED COMPLAINT on the first page.  
20 Because an amended complaint completely replaces the original complaint, plaintiff must  
21 include in it all the claims he wishes to present. See *Ferdik v. Bonzelet*, 963 F.2d 1258,  
22 1262 (9th Cir. 1992). He may not incorporate material from the original complaint by  
23 reference. Failure to amend within the designated time will result in the dismissal of all  
24 claims except for the allegations that plaintiff's mail was delivered late.

25 2. It is the plaintiff's responsibility to prosecute this case. Plaintiff must keep the  
26 court informed of any change of address by filing a separate paper with the clerk headed  
27 "Notice of Change of Address," and must comply with the court's orders in a timely fashion.  
28

1 Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to  
2 Federal Rule of Civil Procedure 41(b).

3 **IT IS SO ORDERED.**

4  
5 Dated: February 17, 2016.

  
\_\_\_\_\_  
NANDOR J. VADAS  
United States Magistrate Judge